85-794

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In The
Supreme Court of the United States
October Term, 1985

PREUIT & MAULDIN, a partnership;
and L. F. MAULDIN, individually and as Executor
of estate of Leonard Preuit, deceased;
and PREUIT MAULDIN,

Petitioners,

v.

SAMUEL JONES, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

T. MICHAEL PUTNAM
POTTS, YOUNG, BLASINGAME & PUTNAM
107 East College Street
Post Office Box 1760
Florence, Alabama 35631
(205) 764-7142

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

I

QUESTION PRESENTED

Whether a cause of action filed pursuant to 42 U.S.C. Section 1983, alleging denial of due process of law arising from the attachment of cotton pickers under color of state law, is an action for personal injuries subject to the period of limitation contained in *Alabama Code* Section 6-2-34(1) (1975) or, rather, subject to the limitation provided in *Alabama Code* Section 6-2-39(a)(5) (1975).

II

PARTIES TO THE PROCEEDINGS

The following are all of the parties to proceedings in the Court of Appeals for the Eleventh Circuit:

Samuel Jones, Jr. ..... Plaintiff/Appellant

Edward F. Mauldin,
individually and as Executor of the
Estate of Leonard Preuit, deceased ..... Defendant/Appellee

Preuit Mauldin ..... Defendant/Appellee

Preuit & Mauldin, a partnership ..... Defendant/Appellee

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO REPORTS OF OPINIONS IN LOWER COURTS	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	19
APPENDIX	App. 1

III

TABLE OF AUTHORITIES

Page

CASES

Brown v. Allen, 344 U.S. 443 (1953) 7

Chessman v. Teets, 354 U.S. 156 (1967) 11

Cochran v. Hasty, 378 So. 2d 1311 (Ala. Civ. App. 1979) 8

Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir., 1980) 8

Federal Mogul Corp. v. Universal Construction Co., 376 So. 2d 716 (Ala. Civ. App.), *cert. denied*, 376 So. 2d 726 (1979) 8

Garcia v. Wilson, 731 F.2d 640 (10th Cir., 1984) (en banc), *aff'd*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) 9, 10, 12

Gates v. Spinks, 771 F.2d 916 (5th Cir., 1985) 16

Hamilton v. City of Overland Park, Kansas, 730 F.2d 613 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985) 9, 10, 11, 12, 14

Ingram v. Steven Robert Corp., 419 F. Supp. 461 (S.D. Ala., 1976), *aff'd*, 547 F.2d 1260 (5th Cir., 1977) 8

Jefferson County v. Reach, 368 So. 2d 250 (Ala., 1978) 8

Kraft Foods Co. v. Commodity Credit Corp., 266 F.2d 254 (7th Cir., 1959) 11

McKay v. Hammock, 730 F.2d 1367 (10th Cir., 1984) (en banc) 9, 11, 12, 13

McMillan v. City of Rockmart, 653 F.2d 907 (5th Cir., Unit B, 1981) 10

Mismash v. Murray City, 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105 S. Ct. 2111, 85 L.Ed. 2d 476 (1985) 9, 11, 12

TABLE OF AUTHORITIES—Continued

Page

Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama, 670 F.2d 16 (5th Cir., Unit B, 1982) 10

Pennick v. City of Florala, 529 F.2d 1242 (5th Cir., 1976) 8

Rubin v. O'Koren, 644 F.2d 1023 (5th Cir., Unit B, 1981) 10

Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed. 2d 415 (1976) 18

Sasser v. Dixon, 290 Ala. 17, 273 So. 2d 182 (1973) 8

Screws v. United States, 325 U.S. 91 (1945) 17

Shorters v. City of Chicago, — F.Supp. —, No. 85-C-6078 (N.D. Ill., September 6, 1985) 16, 17

United States v. Kras, 404 U.S. 434 (1973) 11

Wilson v. Garcia, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) 5, 6, 9, 11, 13, 16, 17, 18

W. T. Ratliff Company v. Hensley, 405 So. 2d 141 (Ala., 1981) 8

STATUTES

42 U.S.C. Section 1983 ..... 2, 5, 8, 13, 17

Alabama Code Section 6-2-34 (1975) 2, 6, 7

Alabama Code Section 6-2-38 (Cumm. Supp., 1985) 7, 14

Alabama Code Section 6-2-39 (1975) 3, 5, 7, 14

Acts of Alabama (1984), 2nd Exec. Sess. No. 85-39 ..... 7, 14

Arizona Rev. Stat., Section 12-542 and Section 12-541 15

Arkansas Stat. (1974) Section 37.206 and Section 37.201 15

TABLE OF AUTHORITIES—Continued

Page

Colorado Revised Statutes, Section 13-80-102 (1973) 13

Connecticut Gen. Rev. Stat. (1983) Section 52-577 and Section 52-584 15

Illinois Revised Statutes, Chap. 110, Section 13-202 17

Kansas Statutes Annotated, Section 60-513 (1976) 12, 14

Kansas Statutes Annotated, Section 60-514 (1976) 12

Michigan Comp. Laws Annot. Section 600.5805 15

Minnesota Stat. (1982) Section 541.05 and Section 541.07 15

Mississippi Code Annot. (1972) Section 15-1-35 and Section 15-1-49 ..... 15, 16

Missouri Rev. Stat of 1978 Section 516.120 and Section 516.140 15

Montana Code Annot., Section 27-2-202 and Section 27-2-204 15

Nebraska Rev. Stat. (1943) Section 25-206, 207 and 214 and Section 25-208 15

Gen. Stat. of North Carolina, Section 1-52(5) and Section 1-54(2) 15

North Dakota Century Code Annot. Section 28-01-16 and Section 28-01-18 15

Ohio Rev. Code Annot. Section 2305.10 and Section 2305.11 15

Oklahoma Stat. (1981) Section 12-95 15

Code of Laws of South Carolina (1976) Section 15-3-520 and Section 15-3-550 15

Utah Code Annot. (1953) Section 78-12-25 and Section 78-12-29 ..... 12, 15

TABLE OF AUTHORITIES—Continued

Page

Rev. Code of Washington Section 4.16.080-090 and Section 4.16.100 15

Wyoming Stat. Section 1-3-105(a)(vi) and (a)(v) 15

MISCELLANEOUS

Stern and Gressman, *Supreme Court Practice,* Section 5.7, (5th edition, 1978) 11

IV

REFERENCE TO REPORTS OF OPINIONS IN LOWER COURTS

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is reported as *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (11th Cir., 1985). The opinion of the district court is reported as *Jones v. Preuit and Mauldin*, 586 F.Supp. 1563 (N.D. Ala., 1984).

———o———

V

STATEMENT OF JURISDICTION

This petition seeks to bring before the Court for review the decision of the United States Court of Appeals for the Eleventh Circuit, entered on June 21, 1985. A petition for rehearing en banc was filed with the clerk of the Court of Appeals on July 9, 1985, and was denied on August 22, 1985. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1254.

———o———

VI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

42 *U.S.C.* Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Alabama Code Section 6-2-34 (1975)

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion or personal property;

(4) Actions founded on promises in writing not under seal;

(5) Actions for the recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;

(6) Actions for the use and occupation of land;

(7) Motions and other actions against the sureties of any sheriff, coroner, constable or any public officer and actions against the sureties of executors, administrators or guardians for any nonfeasance, misfeasance or malfeasance, whatsoever, of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or omission of duty; and

(9) Actions upon any simple contract or specialty not specifically enumerated in this section.

* * *

Alabama Code Section 6-2-39 (1975)

The following must be commenced within one year:

(1) Actions for malicious prosecution;

(2) Actions for seduction;

(3) Actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribed a different limitation;

(4) Actions of libel or slander; and

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; and

(6) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties.

(7) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondent superior.

(8) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent.

VII

STATEMENT OF THE CASE

On February 24, 1984, the respondent, plaintiff Samuel Jones, Jr., filed this action as an original lawsuit in the United States District Court for the Northern District of Alabama, predicating original federal jurisdiction on the civil rights jurisdiction statute, 28 U.S.C. Section 1343. Plaintiff alleged in his complaint that, on April 8, 1982, the sheriff of Lawrence County, Alabama, seized three of plaintiff's cotton pickers pursuant to three writs of attachment issued under the authority of Alabama's attachment statute, *Alabama Code* Section 35-11-111 (1975).

Plaintiff was given no notice or opportunity to be heard prior to seizure of the machines by the sheriff. The writs of attachment were issued at the instance of the petitioners (defendants in the courts below), who had filed suit against plaintiff in the Circuit Court of Lawrence County, Alabama. In plaintiff's Section 1983 action, he alleged that the prejudgment seizure, undertaken pursuant to the writs of attachment, deprived him of the constitutionally guaranteed right to due process of law in violation of the Fourteenth Amendment.

In response to the plaintiff's complaint, defendants filed a motion to dismiss consistent with FRCP 12(b)(6) on March 12, 1984. Setting forth the principal ground that plaintiff's action was filed more than one year after the wrongful acts alleged, defendants asserted that *Alabama Code* Section 6-2-39(a)(5) (1975) was the controlling statute of limitation.

On June 15, 1984, the district court entered an order and memorandum opinion granting the motion and dismissing plaintiff's complaint on the basis that the action was barred by the one-year statute of limitation provided in *Alabama Code* Section 6-2-39(a)(5) (1975). Plaintiff filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit on July 11, 1984. On June 21, 1985, the Court of Appeals rendered its decision, reversing the district court's dismissal and remanding for further proceedings. On July 9, 1985, defendants filed a petition for rehearing en banc, which was denied on August 22, 1985. The opinion of the Court of Appeals held that the plaintiff's complaint was not subject to Alabama's one-year statute of limitation. Referring to the Supreme Court's decision in *Wilson v. Garcia*, — U.S. —, 105 S.Ct.

1938, 85 L.Ed. 2d 254 (1985), the Court of Appeals opined that plaintiff's Section 1983 claim was subject to Alabama's six-year statute of limitation, codified at *Alabama Code* Section 6-2-34 (1975). Because the complaint was filed less than two years following the alleged wrongful acts, it was not, therefore, time barred.

—o—

VIII

ARGUMENT

When the Supreme Court affirmed the United States Court of Appeals for the Tenth Circuit in *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985), it accepted the Tenth Circuit's approach to the knotty problem of selecting a state statute of limitation for application to Section 1983 claims. There, the Supreme Court held that, for purposes of borrowing a state statute of limitation, all Section 1983 claims are best characterized as a "tort action for the recovery of damages for personal injuries . . . ."[1] In each state thereafter, federal courts would be required to apply that state's statute of limitation for personal injury actions. Left unstated by the Court was what *type* of "personal injury" action was meant when, as exists in several states, there are two or more statutes of limitations for different types of personal injury actions.

---

1. *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985).

The Supreme Court's new rule came immediately into play in the decision of the United States Court of Appeals for the Eleventh Circuit in this case. In Alabama, however, the Eleventh Circuit was faced with one statute of limitation for "actions for any trespass to person or liberty, such as false imprisonment or assault and battery; . . ."[2] and a different statute of limitation for "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . . ."[3] Alabama law has repeatedly defined the scope

---

2. *Alabama Code* Section 6-2-34(1) (1975).

3. *Alabama Code* Section 6-2-39(a)(5) (1975), repealed by *Acts of Alabama* of 1984, 2nd Exec. Sess., No. 85-39, Section 3, effective January 9, 1985. General negligence personal injury actions, as of January 9, 1985, are governed by a two-year limitation found at *Alabama Code* Section 6-2-38(1) (Cumm. Supp. 1985), which states "(a)ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

The repeal of Alabama's one-year statute of limitation and its replacement with a two-year statute would not cause any different result than that reached by the district court in this case. If petitioners are correct in their contention that the one-year statute was the proper limitation, the period of limitation would have expired long before the replacement with the two-year statute. In other words, if the one-year statute was the correct statute of limitation, respondent's claim would have become barred in April of 1983, almost two years prior to the modification of the statute.

For at least all Section 1983 claims accruing on or after January 9, 1985, petitioners' position would require application of Alabama's new two-year personal injury limitation. Also, it is at least arguable for all Section 1983 claims accruing before January 9, 1985 and for which the *old* period of limitation had not expired as of the effective

(Continued on following page)

of each statute in such a way that the former applies to direct, trespass injuries and the latter applies to negligent, trespass-on-the-case injuries.[4] Finding assault and battery and false imprisonment to be "paradigmatic" of the types of injuries anticipated by Congress in 1871 when Section 1983 was enacted, the Eleventh Circuit held that this Court had intended the phrase "personal injury actions" to mean actions in trespass, rather than trespass on the case. Hence in this case, Alabama's narrow six-year statute of limitation prevailed over the broader one-year personal injury statute.

The narrow issue presented for review in this petition is whether, for purposes of borrowing a state statute of limitation, Section 1983 claims are best characterized as actions for direct, trespass personal injuries or for simple

---

(Continued from previous page)

date of the new period, that the new period of limitation would also apply. In the present case, however, respondent's claim had expired long before the effective date of the new statute.

4. See *Sasser* v. *Dixon*, 290 Ala. 17, 273 So. 2d 182 (1973); *Cochran* v. *Hasty*, 378 So. 2d 1131, (Ala. Civ. App., 1979); *W. T. Ratliff Company* v. *Hensley*, 405 So. 2d 141 (Ala., 1981); *Pennick* v. *City of Florala*, 529 F.2d 1242 (5th Cir., 1976); *Federal Mogul Corp.* v. *Universal Construction Co.*, 376 So. 2d 716 (Ala. Civ. App.), *cert. denied*, 376 So. 2d 726 (Ala., 1979); *Ingram* v. *Steven Robert Corp.*, 419 F. Supp. 461 (S.D. Ala., 1976), *aff'd*, 547 F.2d 1260 (5th Cir., 1977); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974 (5th Cir., 1980); *Jefferson County* v. *Reach*, 368 So. 2d 250 (Ala., 1978).

negligent personal injuries. Because the "personal injury action" characterization arose in *Wilson v. Garcia,* only the Supreme Court can clarify what *type* of personal injury action was contemplated when that phrase was used in *Wilson.* Petitioners contend here that the reasoning and language used by the Supreme Court in *Wilson* leads one inexorably to interpret the phrase to mean general personal injury actions that both lawyers and laymen understand to be predicated upon negligence. This conclusion is bolstered by the procedural history of the Tenth Circuit cases leading ultimately to the Supreme Court's opinion in *Wilson v. Garcia.* Thus, not only is the Eleventh Circuit's opinion inconsistent with the Supreme Court's holding in *Wilson,* it is also in direct, irreconcilable conflict with the Tenth Circuit cases that served as the foundation for the Supreme Court's action.

It is, of course, the point of this petition that the Eleventh Circuit's decision is incorrect, and that the error is of such importance that this Court should grant certiorari and review the Court of Appeals' opinion. As asserted earlier, it is not only inconsistent with *Wilson v. Garcia,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985), it is also in direct conflict with the Tenth Circuit cases of *Hamilton v. City of Overland Park, Kansas,* 730 F.2d 613 (10th Cir., 1984), (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985); *Mismash v. Murray City,* 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111 85 L.Ed. 2d 476 (1985); *McKay v. Hammock,* 730 F.2d 1367 (10th Cir., 1984) (en banc), and the seminal case of *Garcia v. Wilson,* 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed,* — U.S. —, 105 S.Ct.

1938, 85 L.Ed 2d 254 (1985). That conflict between the Tenth and Eleventh Circuits necessarily turns on the meaning of the language and the reasoning of this Court's opinion in *Wilson*. It was the Supreme Court's acceptance of the Tenth Circuit's characterization of all Section 1983 claims as "personal injury" actions that planted the seed of the dispute. Only because this Court so ruled in *Wilson*, was the Eleventh Circuit required to seek greater clarification for the meaning of "personal injury actions" in the Section 1983 context. Absent that new characterization, the Eleventh Circuit would have followed its old, two-prong test of identifying the "essential nature" of the claim and then analogizing that to the most appropriate state cause of action.[5] In finding that that phrase, as used by the Supreme Court, meant direct injuries in the nature of trespass, the Eleventh Circuit directly contradicted the Tenth Circuit and, petitioners believe, put itself at odds with the Supreme Court.

The Supreme Court's decision in *Wilson* was built upon the Tenth Circuit's unanimous *en banc* decisions in *Garcia v. Wilson*, 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985); *Hamilton v. City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105

---

5. See, e.g., *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama*, 670 F.2d 16 (5th Cir., Unit B, 1982); *McMillan v. City of Rockmart*, 653 F.2d 907 (5th Cir., Unit B, 1981); *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir., Unit B, 1981).

S.Ct. 2111, 85 L.Ed. 2d 476 (1985); *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985); and *McKay v. Hammock*, 730 F.2d 1367 (10th Cir., 1984) (en banc), all decided on the same day. Referred to collectively in the Supreme Court's opinion,[6] all of these cases must be read together as a body of legal reasoning. The Tenth Circuit clearly and intentionally decided the cases in an integrated fashion to assure consistency within the circuit; thus, the reasoning stated in each case likewise applies in an integrated fashion to all of the other cases. Clearly, the four cases can and should be read together as a package.

Three of the Tenth Circuit cases went to the Supreme Court on petitions for certiorari. Certiorari was granted in *Wilson v. Garcia* and the reasoning of the lower court was affirmed. Certiorari was denied in *Hamilton* and *Mismash*, allowing the opinions of court of appeals to stand unchanged. Although ordinarily no significance can or should be attached to denials of certiorari,[7] the integrated reasoning of these cases leads one to believe that these denials of certiorari represented tacit agreement by the Supreme Court with the results reached by the lower court.

---

6. See *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) fn. 10.

7. See *Brown v. Allen*, 344 U.S. 443 (1953); *Chessman v. Teets*, 354 U.S. 156, 164 n. 13 (1967). But see *United States v. Kras*, 404 U.S. 434 (1973); *Kraft Foods Co. v. Commodity Credit Corp.*, 266 F.2d 254 (7th Cir., 1959). See generally, Stern & Gressman, *Supreme Court Practice*, Section 5.7, pp. 353-60 (Fifth ed., 1978).

From among these cases the clearest, most direct conflict with the Eleventh Circuit's holding in the case at bar is found in *Hamilton v. City of Overland Park, Kansas,* 730 F.2d 613 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985). In that case, the court of appeals unequivocally rejected application of Kansas's one-year limitation for actions "for assault, battery, malicious prosecutions, or false imprisonment."[8] Relying expressly on its decision in *Garcia v. Wilson,* the Tenth Circuit held applicable Kansas's two-year limitation for actions "for injury to the rights of another, not arising on contract, and not herein enumerated."[9] Similarly, in *Mismash v. Murray City,* 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 476 (1985), the Tenth Circuit rejected application of Utah's one-year statute for actions "for libel, slander, assault, battery, false imprisonment or seduction."[10]

The Tenth Circuit's reasoning for its holdings in *Hamilton* and *Mismash* can be found most clearly stated in *McKay v. Hammock,* 730 F.2d 1367 (10th Cir., 1984) (en banc), decided together with those cases and *Garcia.* Although *McKay* never went up to the Supreme Court, it, nonetheless, was one of the four integrated cases constituting the body of reasoning exemplified in *Garcia v. Wilson,* 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985). In *McKay,* the court of appeals also rejected Colorado's as-

---

8. *Kansas Stat. Annot.* Section 60-514(2) (1976).

9. *Kansas Stat. Annot.* Section 60-513(a)(4) (1976).

10. *Utah Code Annot.* Section 78-12-29(4) (1953).

sault and battery statute of limitations.[11] The lower court reasoned as follows:

> The Colorado limitations statutes embody the common law distinction between trespass actions which involve injury by the direct and immediate application of force, and actions on the case, in which the injury is committed without direct force. [Citations omitted] Under Colorado law actions for assault and battery and false imprisonment are subject to the one-year period provided by Colo.Rev.Stat. Section 13-80-102 (1973) and actions on the case are subject to the six-year period provided in Colo.Rev.Stat. Section 13-80-110 (1973).
>
> Section 1983 claims may or may not involve the direct application of force. That distinction rests on factors irrelevant to the elements of a section 1983 cause of action and require an analysis of facts underlying a particular claim, an approach we rejected in in *Garcia*.[12]

The rationale stated in the four Tenth Circuit cases plainly indicates that court's recognition that Section 1983 claims are, today, much broader in scope than when originally created by Congress in 1871. a conclusion similarly reached by the Supreme Court.[13] Today, Section 1983 claims embrace a very wide spectrum of conduct, some of which may involve direct force, much of which does not.

---

11. *See McKay v. Hammock*, 730 F.2d 1367 (10th Cir., 1984) (en banc); *Colorado Rev. Stat.* Section 13-80-102 (1973).

12. *McKay v. Hammock*, 630 F.2d 1367, 1370 (10th Cir., 1984) (en banc).

13. "When Section 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 1946, 85 L.Ed. 2d 254 (1985).

The statute provides a general remedy for all injuries to federal rights, not merely injuries caused by direct application of force. It is logically inconsistent, therefore, to select a statute of limitation applicable only to a narrow set of the types of claims asserted under Section 1983. Just as it provides relief against conduct of a much broader scope than merely trespasses like assault and battery and false imprisonment, its statute of limitation must also be such as would cover the broader range of conduct. Most state's statutes of limitation for simple negligent personal injuries do just that.

The decision of the Eleventh Circuit in the case at bar stands in stark contrast to the well-reasoned opinions of the Tenth Circuit. The court below returned to an "essential nature" test and based its decision on factors found by the Tenth Circuit to be irrelevant to the new "personal injury action" analysis. The Eleventh Circuit rejected application of Alabama's then one-year general personal injury statute of limitation,[14] even though it contained language almost identical to the Kansas statute adopted by the Tenth Circuit in *Hamilton*.[15]

---

14. *Alabama Code* Section 6-2-39(a)(5) (1975), repealed by *Acts of Alabama* of 1984, 2nd Exec. Sess., No. 85-39, Section 3, effective January 9, 1985, and replaced by *Alabama Code* Section 6-2-38(1) (Cumm. Supp., 1985); see fn. 3, *supra*.

15. Compare *Kansas Stat. Annot.* Section 60-513(a)(4) (1976) (providing a two-year limitation for actions for "injury to the rights of another, not arising on contract, and not herein enumerated") with *Alabama Code* Section 6-2-39 (a)(5) (1976) (providing a one-year limitation for actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section").

The importance of granting certiorari and reviewing the opinion of the Eleventh Circuit in this case grows not simply out of the need to resolve the conflict between these two circuits. A brief and by no means exhaustive review of the various states reveals that at least sixteen other states (excluding Alabama and Kansas) have different periods of limitation for general personal injury actions, on the one hand, and assault and battery trespass actions, on the other.[16] Clearly, this issue is not an isolated question, but one that will recur repeatedly as each lower federal court struggles to understand the meaning the Court attached to the phrase "personal injury action" in states where different *types* of personal injury actions have different limitation periods. Because the rule enunciated in *Wilson* is relatively new, it is appropriate for the Supreme Court now to take the additional step of giving greater clarity to the personal-injury action standard. Doing so now would aid the lower courts and avoid the tangle of conflicting opinions and inconsistent results bound

---

16. See, e.g., *Arizona Rev. Stat.*, Section 12-542 and Section 12-541; *Arkansas Stat.* (1974) Section 37.206 and Section 37.201; *Connecticut Gen. Rev. Stat.* (1983) Section 52-577 and Section 52-584; *Michigan Comp. Laws Annot.* Section 600.5805; *Minnesota Stat.* (1982) Section 541.05 and Section 541.07; *Mississippi Code Annot.* (1972) Section 15-1-35 and Section 15-1-49; *Missouri Rev. Stat. of 1978* Section 516.120 and Section 516.140; *Montana Code Annot.*, Section 27-2-202 and Section 27-2-204; *Nebraska Rev. Stat.* (1943) Section 25-206, 207 & 214 and Section 25-208; *Gen. Stat. of North Carolina*, Section 1-52(5) and Section 1-54(2); *North Dakota Century Code Annot.* Section 28-01-16 and Section 28-01-18; *Ohio Rev. Code Annot.* Section 2305.10 and Section 2305.11; *Oklahoma Stat.* (1981) Section 12-95; *Code of Laws of South Carolina* (1976) Section 15-3-520 and Section 15-3-550; *Utah Code Annot.* (1953) Section 78-12-25 and Section 78-12-29; *Rev. Code of Washington* Section 4.16.080-090 and Section 4.16.100; *Wyoming Stat.* Section 1-3-105(a)(vi) and (a)(v).

to occur in the absence of a more definitive statement by this Court.

An excellent example of the burgeoning confusion can be found in two recent cases, *Gates v. Spinks*, 771 F.2d 916 (5th Cir., 1985) and *Shorters v. City of Chicago*, — F.Supp. —, No. 85-C-6078 (N.D. Ill., September 6, 1985). In the former case, decided after the case at bar, the Fifth Circuit resorted to reasoning similar to that used by the Eleventh Circuit in the present case, to hold that Section 1983 claims in Mississippi are subject to that state's one-year limitation on actions for assault and battery and false imprisonment. The Fifth Circuit rejected application of Mississippi's six-year statute of limitation for negligent personal injuries.[17] Conversely, in *Shorters v. City of Chicago*, the district court held that Illinois's statute of limitation for "actions for damages for an injury to the person, or for false imprisonment or malicious prose-

---

17. *Gates v. Spinks*, 771 F.2d 916 (11th Cir., 1985), *citing*, *Mississippi Code Annnot.*, Section 15-1-49 (1972).

This case also reveals the danger inherent in following the reasoning of the Eleventh Circuit in the case at bar. In *Wilson v. Garcia*, the Supreme Court stated that by characterizing Section 1983 actions as personal injury actions, it was unlikely that states could discriminate against the federal remedy in setting periods of limitation. However, if one interprets "personal injury action" to mean direct trespass injuries, rather than simple negligent injuries, the result usually is a *shorter* limitation period. Although Alabama is a rare exception, in the main simple negligence personal injury actions have a *longer* limitation than trespass-type actions. Thus, by selecting trespass as the correct characterization, one immediately subjects the vast majority of Section 1983 claims to a far shorter limitation than under a negligence standard. See citations in note 16, *supra*.

cution. . . "[18] did *not* apply to Section 1983 claims because state law had always narrowly construed that statute to apply only to direct physical injuries and not to simple negligent personal injuries. The district court reasoned that the Supreme Court's opinion in *Wilson v. Garcia*, described "personal injury actions" in a way that recognized today's much broader scope for Section 1983 than simply the direct physical injuries originally contemplated in 1871. The court wrote:

> What all this means of course, is that the scope of Section 1983 is not at all limited to the whippings, lynchings, and worse that were the "specific historical catalyst" for its 1871 enactment. Such direct physical injury does not mark the outer boundaries of Section 1983 claims. Wilson plainly teaches its references to "personal injury" and "injuries to personal rights" encompass not only such injuries (of which the sheriff's racially-motivated fatal beating of a prisoner in the seminal case of *Screws v. United States*, 325 U.S. 913 (1945) is the archetype) but also the far wider range of harms that this and all other federal courts regularly treat with in Section 1983 litigation.[19]

The conflicting views of these two cases are simply extensions of the two lines of reasoning exemplified by the present case in contrast to the four Tenth Circuit cases referred to above. The importance of the case at bar is that it has created the danger that these conflicting views will continue to divide the lower federal courts in disagreement about the correct interpretation of the teachings in *Wilson v. Garcia*. To avoid the risk of an irreconcilable

---

18. *Illinois Rev. Stat.*, chap. 110, Section 13-202.

19. *Shorters v. City of Chicago*, — F.Supp. —, No. 85-C-6078 (N.D. Ill., September 6, 1985).

split in the circuits, this Court should review this case, the first of its kind, to more clearly define the type of personal injury action the Court had in mind when that term was used in *Wilson v. Garcia.* Unlike *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586; 49 L.Ed. 415 (1976), where the issue was the court of appeals' interpretation of state law, this case involves the lower court's interpretation of the Supreme Court's own meaning in the phrase "personal injury action". The only definitive answer about that meaning, of course, can come only from the Supreme Court. Moreover, only the Supreme Court can correct the error of the Eleventh Circuit and re-introduce a uniform standard by which all federal courts are to select state statutes of limitation. Although states may split on the various types of personal injuries recognized, it is clear that every state has one and only one statute of limitation for simple negligent personal injuries, whereas not all states have a separate trespass personal injury limitation. Because greater consistency of reasoning and result can be obtained by mandating the application of each state's statute of limitation for simple negligent personal injuries, that is the meaning petitioners believe the Supreme Court intended in *Wilson v. Garcia.*

CONCLUSION

For the reasons asserted above, and particularly for the reason that the issue in this case has a profound effect on many Section 1983 cases yet to be litigated, petitioners respectfully request that the Supreme Court grant this petition and review and reverse the decision of the Court of Appeals.

Respectfully submitted,

T. Michael Putnam
Potts, Young, Blasingame
& Putnam
107 East College Street
Post Office Box 1760
Florence, Alabama 35631
(205) 764-7142

Attorneys for Petitioners

APPENDIX

Samuel JONES, Jr., Plaintiff-Appellant,

v.

PREUIT & MAULDIN, et al.,
Defendants-Appellees.

No. 84-7482

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

On February 24, 1984, Samuel Jones filed suit against Preuit & Mauldin, a partnership engaged in the business of servicing equipment. The complaint alleged that on April 8, 1982, the defendants, acting pursuant to ALA. CODE § 35-11-111 (1975), obtained writs of attachment for three International Harvester cotton pickers belonging to Jones. The sheriff of Lawrence County seized the machines on April 18, 1982, without notice to Jones or a preseizure hearing. The attachment also took place prior to judgment in the defendants' underlying state court actions for a debt for repairs to the pickers. Jones claims that such prejudgment attachment procedures deprived him of due process of law in contravention of *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and its progeny. Jones brought this claim under 42 U.S.C.A. § 1983 (West 1981). The defendants moved for dismissal for failure to state a claim and for failure to bring the suit within the statutory time limit. The district court, 586 F.Supp. 1563, granted the motion and rejected the plaintiff's claim that the most relevant state statute was the

three-year statute governing suits on attachment bonds, ALA.CODE § 6-6-148 (1975). Instead, the court applied the one-year "catchall" statute of limitations, covering "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section." ALA.CODE § 6-2-39(a)(5) (1975). Since the plaintiff had filed suit 22 months after the attachment, the court dismissed the case.

I. STATEWIDE CHARACTERIZATION OF SECTION 1983 CLAIMS

Because Section 1983 does not contain a specific statute of limitations, U.S.C.A. § 1988 (West 1981) directs courts to select and apply the most appropriate or analogous state statute of limitations. *Burnett v. Grattan,* — U.S. —, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Board of Regents v. Tomanio,* 446 U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed2d 295 (1975). So long as that analogous state provision is not inconsistent with the policies underlying the federal cause of action, *Johnson,* 421 U.S. at 465, 95 S.Ct. at 1722; *Ehlers v. City of Decatur,* 614 F.2d 54 (5th Cir.1980), a federal court may treat the state statute of limitations as controlling.

In this Circuit the choice of an appropriate state statute has proceeded in two steps. First, the court determines the "essential nature" of the claim. Federal law determines the essential nature of the claim, yet federal law resolves question largely by reference to state law. *Shaw v. McCorkle,* 537 F.2d 1289 (5th Cir.1976). Second, the court decides which statute of limitations a state court

would apply if faced with a claim of the same type or class as the Section 1983 claim. *Beard v. Stephens*, 372 F.2d 685 (5th Cir.1967).

The Supreme Court's recent decision in *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), relieves this court of the difficult task of characterizing the essential nature of Section 1983 claims in varying contexts.[1] The Court in *Wilson* held first that the char-

---

1. Despite the single structure for analysis, courts in this Circuit have used subtle but important differences in characterizing the essential nature of various Section 1983 claims. Some courts have denominated the facts as alleged in the complaint and a generalized statement of the legal claim as the essential nature of the claim. *See Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama*, 670 F.2d 16 (5th Cir. Unit B 1982) (essential nature is "suit against a city, its councilmen and mayor for an asserted denial of property rights resulting from delay in the issuance of a sewer permit"); *Prince v. Wallace*, 568 F.2d 1176 (5th Cir. 1978); *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967). Other courts have gone one step further and used this literal description of the federal claim to group it with similar state law claims. *See Whatley v. Department of Education*, 673 F.2d 873 (5th Cir. Unit B 1982) (employment due process claims grouped together with actions for recovery of lost wages); *see also McGhee v. Ogburn*, 707 F.2d 1312 (11th Cir.1983); *Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers*, 445 F.2d 545 (5th Cir.1971), *cert. denied*, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972).

Under the first approach, most of the work of evaluating the strength of the relationship between the federal claim and various state claims is left for the second step of the process. State law controls the evaluation. If the facts and general description of the federal claim could not be reframed as a viable state law cause of action with a special statute of limitations, the claim would fall into the state's catchall provision simply because a state court would place it there. By contrast, under the second approach the crucial evaluation is drawn at the first stage of the inquiry, where

(Continued on following page)

acterization of a Section 1983 claim for statute of limitations purposes is a question of federal law. Next, the Court held that a simple and uniform characterization of all Section 1983 claims best fits the statute's remedial purpose because a uniform characterization prevents the "uncertainty and time-consuming litigation" caused when courts predicate their choice of the correct statute of limitations "on an analysis of the particular facts of each claim." 105 S.Ct. at 1945. Hence, federal courts must "select, in each State, the one most appropriate statute of limitations for all § 1983 claims." *Id.* at 1947.

Finally, the *Wilson* court held that federal courts hearing claims under Section 1983 should borrow the state limitations statute governing "personal injury" claims rather than a "catchall" limitations period, a limitations statute for damage to property or breach of contract, or a limitations statute governing suits against public officials. The task facing this court, therefore, is to choose the one Alabama limitations statute governing claims for recovery of damages for "personal injury" that federal

---

(Continued from previous page)

state law is informative but not controlling. Thus, even if the complaint could not be recast as a state cause of action with a special statute of limitations, the court asks whether there is any state claim of the same general type.

The *Wilson* decision departs from both of these approaches because it characterizes all Section 1983 claims without regard to the particular facts underlying individual claims. Because previous precedents in this Circuit were decided under methods inconsistent with the *Wilson* analysis, we must determine anew the appropriate statute of limitations under Alabama law.

courts should borrow for purposes of 42 U.S.C. § 1983 (West 1981).[2]

II. ESSENTIAL NATURE OF SECTION 1983 PERSONAL INJURY CLAIMS

Two Alabama statutes govern the limitations periods for bringing personal injury suits. The six-year statute, ALA.CODE § 6-2-34(1) (1975), governs all actions "for any trespass to person or liberty, such as false imprisonment or assault and battery." The one-year statute, ALA. CODE § 6-2-39(a)(5) (1975), applies to actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."[3] The choice between these two statutes depends upon whether the wrongful act constitutes a trespass or a trespass on the case: Section 6-2-34(1) governs trespass actions while Section 6-2-39(a)(5) governs trespass on the case. *C.O.*

---

2. The defendants have not suggested to this Court that *Wilson* should only apply prospectively. We also note that the defendants have taken no action in reliance on precedent overruled by *Wilson*, and the policies of intra-state uniformity and certainty that underlie the *Wilson* decision would be hindered by failure to apply the decision retroactively. Each of these facts cuts in favor of retroactive application of *Wilson* against the defendants under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971).

3. Since the filing of this appeal, the Alabama legislature has repealed Section 6-2-39 and extended the relevant limitations period to two years. *See* Act of Jan. 9, 1985, No. 85-39 1984 Ala.Acts—(to be codified at ALA.CODE § 6-2-38(1)). Because we hold that Section 6-2-34(1) is the appropriate state statute of limitations, we do not decide which version of the catchall statute (the statute dealing with personal injury claims sounding in trespass on the case) would be applied as a matter of federal law in this case.

Osborn Contracting Co. v. Alabama Gas Corp., 273 Ala. 6, 135 So.2d 166 (1961); *Smith and Gaston Funeral Directors v. Dean*, 262 Ala. 600, 80 So.2d 227 (1955); *Pennick v. City of Florala*, 529 F.2d 1242 (5th Cir. 1976); *Beard v. Stephens*, 372 F.2d 685 (5th Cir.1967). The choice of the proper and analogous Alabama statute for purposes of Section 1983 claims will depend, then, on whether the "personal injury" that is the essential nature of all Section 1983 claims is more akin to trespass or trespass on the case. This calls for some elaboration on the "essential nature" of Section 1983 claims and is therefore a question of federal law, but one that may be informed by the state law definition of trespass and trespass on the case.

Under Alabama law, trespass involves an intentional act done with force and immediately injurious to the person of another or to property in his or her possession. Trespass on the case would lie when the wrongful act causes harm only indirectly and without an intentional act of force.[4] *W.T. Ratliff Co., Inc. v. Henley*, 405 So.2d 141 (Ala.1981). Trespass requires intentional or "wanton" causation of injury as opposed to mere negligence, *City of Fairhope v. Raddcliffe*, 48 Ala.App. 224, 263 So.2d 682 (1972); *Cochran v. Hasty*, 378 So.2d 1131 (Ala.Civ.App.

---

4. Alabama has modified the common law distinction between trespass and case, but the direct/indirect distinction remains a dominant method for separating the two causes of action in cases involving injury to the person. An indirect injury is one that is merely "consequential" and not a direct result of the wrongful act. The presence of some intervening contributory cause shows that an act is the indirect cause of injury. *Sasser v. Dixon*, 290 Ala. 17, 273 So.2d 182 (1973); *see Borland v. Sanders Lead Co. Inc.*, 369 So.2d 523 (Ala. 1979) (establishing elements of proof for indirect trespass to property).

1979), or an omission of a duty to act. *Sasser v. Dixon*, 290 Ala. 17, 273 So.2d 182 (1973). Liability based on *respondent superior* is framed as trespass on the case. *C.O. Osborn Contracting Co. v. Alabama Gas Corp.*, 273 Ala. 6, 135 So.2d 166 (1961).

The characterization of Section 1983 claims given by the Supreme Court in *Wilson* resembles an action in trespass on the case. The Court analyzed the legislative history of the Reconstruction Civil Rights Acts and noted that the specific historical catalyst for those statutes was the "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." 105 S.Ct. at 1947. *See generally* A. TRELEASE, WHITE TERROR 261-73 (1971) (describing activities of Ku Klux Klan in northern Alabama). The Congress had been especially concerned with murder, whippings, lynchings and banishings; the statutory remedy for violation of constitutional rights was meant to restore peace and justice. 105 S.Ct. 1947; *see also Briscoe v. LaHue*, 460 U.S. 325, 336-40, 103 S.Ct. 1108, 1116-18, 75 L.Ed.2d 96 (1982). These acts of violence are all "direct" and intentional injuries to the person that would sound in trespass. *Cf. Beard v. Stephens*, 372 F.2d 685 5th Cir.1967); *Holcombe v. Whitaker*, 294 Ala. 430, 318 So.2d 289 (1975); *Donald v. Swann*, 24 Ala.App. 463, 137 So. 178, *cert. denied*, 223 Ala. 293, 137 So. 181 (1931).

On the other hand, the remedy ultimately chosen by the 42d Congress in Section 1983 did not address only those wrongs that most concerned the legislators. Klan activities epitomized a general inadequacy and inequality in state law enforcement. *Monroe v. Pape*, 365 U.S. 167, 172-83, 81 S.Ct. 473, 476-82, 5 L.Ed.2d 492 (1961). The "uni-

fying theme" of the statutes, equality of all persons under the law, constituted a goal much broader than the prevention of physical violence. *Wilson*, 105 S.Ct. at 1947. Nothing in the language or legislative history limits Section 1983 solely to intentional deprivations of constitutional rights. *Parratt v. Taylor*, 451 U.S. 527, 534, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); *Baker v. McCollan*, 443 U.S. 137, 139-40, 99 S.Ct. 2689, 2692-93, 61 L.Ed.2d 433 (1979).

Obviously, then, some Section 1983 claims will sound in trespass and others in trespass on the case. Some will involve direct injuries, *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A 1981) (unjustified assault on citizen by police officer, and others will involve indirect injuries. *Glover v. Alabama Department of Corrections*, 734 F.2d 691 (11th Cir.1984) (prison official induces several prisoners to assault another prisoner), or injuries caused without the use of force, *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir.1982) (city commissioners' alleged harassment of business through excessive regulation), *cert. denied*, 460 U.S. 1039, 103 S.Ct. 1451, 75 L.Ed.2d 791 (1983). As the Supreme Court has stated, "[a] catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics." *Wilson*, 105 S.Ct. at 1947. The Section 1983 remedy encompasses a broad range of tort analogies. *Id.* at 1947.

The "essential nature" of a Section 1983 personal injury claim cannot, therefore, be determined simply by asking for which of the state law causes of action personal injury, such as trespass or trespass on the case, could also be brought under the federal statute. That question yields

too many answers. The appropriate characterization of Section 1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in *Wilson* made such a determination in order to conclude that Section 1983 claims are personal injury claims rather than general statutory claims falling within a catchall limitations statute. The scarcity of statutory claims in 1871 and the primacy of constitutional claims under Section 1983 prevented the use of a state catchall statute. Constitutional claims are only a subset of the claims falling within the Section 1983 remedy, but they were the most significant subset in the eyes of the 42d Congress. *Wilson*, 105 S.Ct. at 1947.

Similarly, personal injuries sounding in trespass make up the most significant subset of claims within Section 1983. The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of international and direct violence on the part of the Ku Klux Klan. The 1871 Act was enacted after President Grant described for Congress the breakdown of law and order in the Southern States. Conditions "rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous" led the President to ask for legislation. The President's request stated that proof of the conditions in the South had been presented to the Senate. S.REP. NO. 1, 42d Cong., 1st Sess. (1871). That Senate Report, relied upon extensively by the Congress, *see CONG. GLOBE*, 42d Cong., 1st Sess. App. 166-67 (1871) (remarks of Rep. Williams), detailed murders, whippings and other acts of violence on the part

of the Klan. Senator Sherman's original resolution calling for the passage of a bill was motivated by the activities of armed men who had "by force, terror and violence subverted all civil authority, . . . overthrowing the safety of persons and property and all those rights which are the primary basis and object of all civil government." The bill would "punish such organized violence." *Id.* at 152.

The debates focused on arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation perpetrated by the Klan. *Briscoe v. LaHue*, 460 U.S. 325, 337, 103 S.Ct. 1108, 1117, 75 L.Ed.2d 96 (1982). These primary wrongs were only compounded by the lack of effective state law remedies. When the legislators complained that the state authorities had been unable or unwilling to protect the constitutional rights of individuals, *see Patsy v. Board of Regents of Florida*, 457 U.S. 496, 505, 102 S.Ct. 2557, 2562, 73 L.Ed.2d 172 (1982), they usually meant that a black citizen had no recourse against illegal acts of violence or trespass. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Lowe) ("While murder is stalking abroad in disguise, while whippings and lynchings and banishings have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."); *id.* at 156 (remarks of Sen. Sherman) (Klansmen do not "think it any crime to kill a negro or rob a Yankee"); *id.* at 199-200 (remarks of Sen. Nye); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 441-444 (remarks of Rep. Butler).

The extensive legislative history demonstrates that members of the 42d Congress considered direct acts of violence against black citizens to be the paradigmatic

wrong addressed by the new statute. Hence, the essential nature of a Section 1983 claim fits the description of trespass under Alabama law. We conclude on the basis of Congressional intent and the Supreme Court's opinion in *Wilson v. Garcia, supra,* that a Section 1983 claim should be characterized as a personal injury action along the lines of a trespass. Therefore, federal courts in Alabama will borrow the length of the limitations period as found in ALA.CODE § 6-2-34(1) (1975), together with the proper state law treatment of related questions of tolling and application. That statute contains a six-year limitation period. Jones filed his suit before this limitation period had elapsed and the district court improperly dismissed the case.[5]

REVERSED.

Samuel JONES, Jr., Plaintiff.

v.

PREUIT & MAULDIN, etc., et al., Defendants.

Civ. A. No. 84-AR-5131-NW.

United States District Court,
N.D. Alabama,
Northwestern Division.

June 15, 1984.

MEMORANDUM OPINION

ACKER, District Judge.

This action was brought by plaintiff, Samuel Jones, Jr. (Jones), pursuant to 42 U.S.C. § 1983 charging that

---

5. The defendants do not raise any alternative basis for affirming the district court's dismissal of the case.

certain of plaintiff's property was wrongfully seized under color of state law by constitutional violation inherent in the attachment procedure. The portion of the complaint here pertinent alleges that the "procedure did not comply with the requirements of the Fourteenth Amendment concerning deprivations of property without due process of law in relation to prejudgment seizures of property". The alleged constitutional deprivation occurred on April 8, 1982. Jones filed his complaint on February 24, 1984. Defendants have filed a motion to dismiss the complaint, asserting as an absolute defense the statute of limitations of one year. If defendants are correct and if the applicable statute of limitations is one year, then plaintiff is clearly barred on the face of his complaint. If, however, the applicable statute of limitations is three years, as Jones contends, then his action may proceed to a hearing on the merits.

It no longer requires citation of authority for the proposition that because § 1983 itself contains no statute of limitations, the federal courts look to and apply the state statute of limitations most nearly analogous to the particular § 1983 claim being brought. However, as was eloquently elucidated by Hon. Robert Propst in *Fomby v. City of Calera*, 575 F.Supp. 221, 223 (N.D.Ala. 1983), "[t]he *choice* of a limitations period for a *federal* cause of action is itself a question of *federal* law". (emphasis supplied). This Court thoroughly agrees with Judge Propst. Judge Propst's persuasive rationale is reminiscent of one of the opening scenes in Gone With The Wind, which contains the following dialogue taking place among field hands at the close of the day, with Tara in the distant background. The scene

in the screen play is called "Quitting Time at the Plantation". Most serious moviegoers will remember.

Scene

> Cotton field, with field hands at work plowing furrows. The bell at Tara is heard faintly. One of the hands, Elijah, stops.
>
> *Elijah*: Quittin' time!
>
> Another huge black man, known as Big Sam, turns on Elijah sharply:
>
> *Big Sam*: Who said?
>
> *Elijah*: I sez.
>
> *Big Sam*: You can't sez. I'se de foahman. I'se de one dat sez when it's time to quit [He calls out loudly to the other hands.] QUITTIN' TIME!

To paraphrase Big Sam inversely and to reiterate Judge Propst, it is the *federal* court which says when it is "STARTIN' TIME" under § 1983. Although the federal court must look to the state law for the appropriate statute of limitations, it is not the state which "sez" what particular statute of limitations the federal court must apply. The state simply furnishes its various statutes of limitations for perusal and selection by the federal court in the context of the particular § 1983 complaint.

Jones here urges that the Alabama statute of limitations more nearly analogous to his situation is Ala.Code § 6-6-148 (1975), which reads as follows:

> At any time within three years of the suing out of the attachment, before or after the action is determined, the defendant in attachment may commence an action on the attachment bond and may recover such

> damages as he has actually sustained if the attachment was wrongfully sued out and, if sued out of maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

On the other hand, defendants assert that the here appropriate statute of limitations is Ala.Code § 6-2-39(a)(5) (1975), which reads as follows:

> (a) The following must be commenced within one year:
>
> * * *
>
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section.

Jones must acknowledge that his is not a suit on a *bond,* which admittedly is a specialized form of contract and, if sued upon, constitutes an action *ex contractu.* Rather, Jones insists that his action, although admittedly *ex delicto,* is controlled by the three year statute provided by Ala.Code § 6-6-148 (1975) for suits on attachment bonds. He relies entirely upon a *dictum* in *Goldstein v. Nobles,* 198 Ala. 430, 73 So. 822 (1916). This hoary case contains language which Jones would interpret to give him a three year statute of limitations. He would give a significance to *Goldstein* which does not bear up under careful analysis. The pertinent language from *Goldstein* is as follows:

> Section 2966 of the Code of 1907 [6-6-148] authorizes suit upon the bond any time within three years *before* or after suit is determined, and our court has held that *this right* exists as to the common-law action as well as a suit upon a bond. *Alsop v. Lidden,* 130 Ala. 553, 30 South. 401; *Brown v. Master,* 104 Ala. 463, 16 South. 443. It is true these cases construed the statute as it existed prior to the Code of 1907, and a part of sec-

> tion 565 of the Code of 1896 (now section 2966 of the Code of 1907) was left out of the present Code, but there was no change as to *the right to bring the action either before or after the determination of the suit.* It has also been held that this statute applies to actions for the wrongful suing out of garnishments as well as attachments. *Barber v. Ferrill,* 57 Ala. 446. Hence the trial court did not err in overruling the defendant's demurrer to the complaint for failing to aver that the suit had been determined, or in sustaining the demurrers to the special pleas setting up that this action was *prematurely brought.* (emphasis supplied).

198 Ala. at 431-32; 73 So. at 823.

To understand *Goldstein* the first important fact to recognize is that the issue presented here by Jones was ***not*** presented in *Goldstein.* Nowhere was the Supreme Court in *Goldstein* confronted with the question of whether or not the victim of a wrongful attachment can bring a tort action for wrongful attachment at any time within three years after the occurrence. Rather, in *Goldstein* the issue was simply whether or not a tort action for an allegedly wrongful attachment can be brought *before* a determination in the main case of the question of whether or not the attachment was, in fact or law, erroneous and therefore "wrongful". If the Alabama Court really meant to say that there is a three year statute of limitations for the *tort* of wrongful attachment (which this Court disputes, ***infra***) its inartful expression of the thought in *Goldstein* was not a part of its holding, was unnecessary to its decision, and thus was pure *dictum. Dictum* is not the stuff for the fashioning of a new § 1983 limitation.

Secondly, and more importantly, this Court does not believe that the Alabama Court in 1916 either believed or

intended to express a belief that the statute of limitations for wrongful attachment is three years in Alabama. Not only has the Alabama Court never reiterated or hinted any such intent between 1916 and this date in 1984, but that court's limited intent can be discerned from the language which the court actually used. Its language may have been somewhat misleading, but what it was trying to say becomes clear upon a careful reading. When the court said "[s]ection 2966 of the Code of 1907 [§ 6-6-148] authorizes suit upon the bond any time within three years *before* or after suit is determined, and our court has held that *this right* exists as to the common-law action as well as a suit upon a bond" (emphasis supplied), the argument was to justify the bringing of a common law action *before* a determination of the efficacy of the garnishment writ. 73 So. at 823. The gratuitous use of the words "or after" was not intended by the Alabama Court to be related grammatically to the three year statute of limitations, but rather to support the elimination of the defense of prematurity where such a suit is brought before a final determination of the legal effect of the attachment. While its grammar may have been imperfect, the Alabama Court's reasoning shines through.

Thirdly, the Alabama Court's citation of *Alsop v. Lidden,* 130 Ala. 548, 30 So. 401 (1901) and *Brown v. Master,* 104 Ala. 451, 16 So. 443 (1894), as authorities for its proposition again proves the limitation on that Court's holding. Neither *Alsop* nor *Brown* involve a choice between statutes of limitations. To the contrary, both of these earlier cases deal with the defense of prematurity where there had been no predetermination of a want of probable cause for an attachment or a garnishment. This is a distinction sim-

ilar to the well recognized distinction between the cause of action known as "malicious civil prosecution" (which requires a prior adjudication against the prosecuting party) and the cause of action known as "abuse of process" (which does not require such a prior adjudication). The Alabama Court was, of course, correct in holding that the common law or *ex delicto* action for wrongful attachment does not have as a prerequisite a judicial determination that the attachment was wrongful. It is a *non sequitur* which the Alabama Court could not have meant to indulge to jump to the conclusion that a person having such an *ex delicto* cause of action can wait three years to bring suit simply because he can bring an action *ex contractu* on the attachment bond within three years.

Fourthly, the sharp difference between a contract claim and a tort claim cannot be overemphasized. In the classic tort action all actual damages (and even punitive damages under some circumstances) proximately caused by the wrongful act, are recoverable. However, in a suit on a bond the face amount of the bond places a limitation on the amount of recovery, whether the damages are actual, or punitive, or both. Perhaps it would be theoretically possible to draft a bond of an unlimited monetary amount covering all possible losses resulting from a breach of the bond. But this Court is not here dealing with such an hypothetical bond but with the law of Alabama which does not contemplate the execution of a bond of unlimited amount in order to obtain a writ of attachment. See Ala.Code §§ 6-6-45, 6-6-120 (1975).

Lastly, it is not necessary for this Court to explain or to avoid the 1916 *dictum* in *Goldstein*. The more recent truth, as expressed in *Fomby v. City of Calera, supra*, is

that a federal court in ascertaining the proper period of limitations in § 1983 cases must look to the "essential nature" of the claim and cannot be controlled by the tag which the plaintiff may put on it. *See Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967). Applying this federal rule, this Court finds that the "essential nature" of Jones' claim, *as unequivocally described in his own complaint*, is that he sustained damages as a proximate consequence of a denial of "due process". It is impossible to squeeze such a claim into the would-be category of a suit on an attachment bond in order to push the limitations period beyond one year. Jones' wishful thinking is well argued by counsel, but it ultimately fails. In *Harrison v. Emens*, 235 Ala. 319, 179 So. 219 (1938) the Supreme Court of Alabama recognized that the "essential nature" of a claim for wrongful attachment (whether brought on the attachment bond [*ex contractu*] or directly for vexatious or malicious conduct [*ex delicto*]) is tort-like. There, in a suit brought on an attachment bond, the Alabama Court said:

> While the action is on the bond, as authorized by Code 1923, § 6214 [6-6-148], yet so far as "the nature and character of the evidence necessary to sustain it, is to be considered, *bears a closer resemblance to an action for malicious prosecutions, than to any other action at common law.* It is necessary for the plaintiff to aver in his complaint, the falsity of the particular fact, or facts, which may be stated in the affidavit as the ground of attachment. *Tiller v. Shearer*, 20 Ala. 527. The averment of the falsity of the affidavit, though it may be negative in form, and may involve proof of a negative, casts on the plaintiff the onus of supporting it by evidence either direct, or of circumstances from which the jury may fairly infer the untruth of the fact or facts stated in the affidavit.

> The right of recovery rests on the wrongful or vexatious use (or both), of the extraordinary and harsh remedy by attachment in [and] this forms the gravamen of the plaintiff's complaint. *O'Grady v. Julian*, 34 Ala. 88." *Durr v. Jackson*, 59 Ala. 203.
>
> It is not essential to the existence of a cause of action that the attachment should be both wrongful and vexatious or malicious, but *it is essential that it be wrongful;* that is, that no debt exists for the collection of which the extraordinary process may be resorted to, or if such debt exists, that no ground for the issuance of the writ in fact existed. (emphasis supplied).

235 Ala. at 320; 179 So. at 219-20.

It is of more than passing interest that the cause of action, i.e., malicious prosecution, which the Court in *Harrison* found to bear a close resemblance to one for wrongful attachment, has a one year statute of limitations. *See* Ala.Code § 6-2-39(a)(1) (1975). It is inconceivable to this Court that the Alabama Legislature intended, when it enacted § 6-6-148, to provide two years beyond the "catch-all" statute and beyond the "malicious prosecution" statute when a claim for wrongful attachment is brought, *not on the bond, but on a common law theory of wrongful attachment most closely resembling malicious prosecution.* It would indeed be a strained construction of § 6-6-148 to find in it a waiver of the one year statute of limitations contained both in § 6-2-39(a)(1) and in § 6-2-39(a)(5).

The statute of limitations in Alabama for claims arising out of violations of "due process" rights has routinely been considered by the Alabama courts and by the federal courts to be the "catch-all" one year statute of limitations contained in § 6-2-39(a)(5). Not only is this

the clear holding of the Supreme Court of Alabama in *Limbaugh v. Johnston,* 393 So.2d 963 (Ala.1981), but the Alabama Court is clearly echoed in *Rubin v. O'Koren,* 644 F.2d 1023 (5th Cir. Unit B, 1981), and in *Nathan Rodgers Construction & Realty Corp. v. City of Saraland,* 670 F.2d 16, 20 (5th Cir. Unit B), *reh'g denied* 676 F.2d 162 (5th Cir. Unit B, 1982) where the embryonic Eleventh Circuit said:

> [T]he one-year statute applied by the district court covers 'actions for any injury to the person or rights of another not arising from contract' Ala.Code § 6-2-39(a)(5). This is such an action.

To put it simply, the "essential nature" of Jones' complaint does not involve an attachment bond. Rather, the gravamen of his complaint is an alleged due process deprivation.

Not out of the pride manifested in Big Sam's expression of his prerogative as boss in the cotton field, but because the duty of a federal court is to select the most appropriate state statute of limitations in § 1983 actions, and because this Court deems that Jones' complaint of a constitutional denial of "due process" makes § 6-2-39(a)(5) a more analogous statute than anly analogy which can be drawn as to a case brought under § 6-6-148, the Court concludes that defendants' motion to dismiss is due to be granted. Plaintiff's complaint is therefore time barred.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHWESTERN DIVISION

CIVIL ACTION NO. 84-AR-5131-NW

Entered: 6/15/84

SAMUEL JONES, JR.,

Plaintiff

vs.

PREUIT & MAULDIN, etc., et al.,

Defendants

ORDER

In conformity with the accompanying Memorandum Opinion, it is ORDERED that defendants' motion to dismiss be and the same is hereby GRANTED. Plaintiff shall have and recover NOTHING of defendants, and this action is hereby DISMISSED without prejudice to any state claim on an attachment bond.

Costs are taxed against plaintiff.

DONE this 15th day of June, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7482

D.C. Docket No. 84-5131

SAMUEL JONES, JR.,

Plaintiff-Appellant,

versus

PREUIT & MAULDIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be and the same is hereby, REVERSED;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 21, 1985

For the Court: Spencer D. Mercer, Clerk

By: Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: September 4, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7482

SAMUEL JONES, JR.

Plaintiff-Appellant,

versus

PREUIT & MAULDIN, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 21, 11 Cir. 1985, — F.2d —).
(August 22, 1985)

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Frank M. Johnson, Jr.

United States Circuit Judge